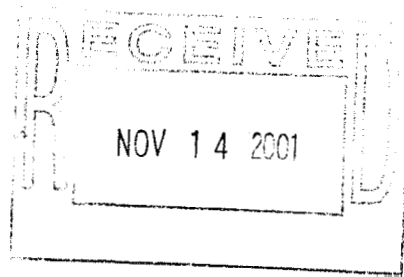


National Marine Fisheries Service  
Office of Protected Resources  
Permits Division (F/PR1)  
1315 East-West Highway  
Room 13705  
Silver Spring, MD 20910



RE: Docket No. 001031304-0304-01

*for ea 10/29/01*

Hardenvijk, 29 October 2001

Dear Madam/Sir:

On behalf of Dolphinarium Hardenvijk bv, I **am** submitting comments on the National Marine Fisheries Service's (NMFS) proposed rule amending public display requirements under the Marine Mammal Protection Act (MMPA), which are intended to implement the amendments to the MMPA enacted in 1994.

Dolphinarium Harderwijk bv objects strongly to the proposed rules. They are inconsistent with, and contradict, the 1994 amendments to the MMPA. They resurrect many of the same sweeping and costly proposals NMFS proposed in 1993, which Congress rejected in 1994.

#### **Care and Maintenance Standards**

In the 1994 Amendments, Congress decided it was wasteful for two agencies to have identical responsibilities for enforcing care and maintenance **standards** for **marine** mammals. Therefore, Congress determined that the *Animal* and Plant Health Inspection Service (APHIS) would have sole authority over the care and maintenance of animals at public display facilities. Nevertheless, the Proposed Regulations resurrect the rejected 1993 approach by giving NMFS joint responsibility to enforce **APHIS'** care and maintenance standards.

Compounding the problem of having two agencies enforcing the **same** regulations, the Proposed Regulations state that "any person" designated by NMFS will also have the right to examine any marine mammal held for public display, to inspect **any** public display facility, and to review and copy all records." This raises public policy and significant privacy issues regarding why any member of the public designated by NMFS should have the right to inspect facilities for compliance with APHIS standards and to require public display facilities to turnover **all** of their records.

In the 1994 amendments to the MMPA, Congress clearly provided that the establishment and enforcement of marine mammal care and maintenance standards is APHIS' responsibility. We object strongly to NMFS' efforts to again establish duplicative inspection authority.

### **Export of Marine Mammals**

Although Congress and the courts have rejected NMFS' effort to apply the MMPA in foreign nations, the Proposed Regulations continue to make foreign citizens subject to **W S** ' regulations. The United States v. Mitchell decision in 1977 held that the MMPA does not apply within the territory of a foreign sovereign. Indeed, a December 10, 1996, opinion from the Office of General Counsel, NOAA, stated the MMPA "does not confer U.S. jurisdiction over marine mammals in the territory of other sovereign states."

The 1994 Amendments provided that any person properly holding marine mammals for public display in the United States could export the animals "without obtaining any additional permit or authorization." The Amendments effectively addressed the export issue by stating that a marine mammal could be exported for public display if the receiving facility met "standards that are comparable to the requirements that a person must meet to receive a permit" under the MMPA for public display. There are three such standards: the facility must (1) offer a program for education or conservation based on professionally recognized standards of the public display community; (2) have **an** APHIS registration or license; and (3) be open to the public on a regularly scheduled basis with access not limited except by an admission fee.

The Proposed Regulations do not reflect Congress' intent, and, in fact, go even further. They do not defer to APHIS' comparability review of non-U.S. facilities and bide by APHIS decision **as** to whether the facility should receive an exported marine mammal. The Proposed Regulations require that NMFS independently determine that the facility complies with APHIS' care and maintenance standards.

In addition, these NMFS ~~d e s~~ continue to insist on letters of "comity" **as** a condition of export. This ineffectual approach has **caused** U.S. and foreign public display facilities to incur enormous transactional costs to find some way to satisfy NMFS and the foreign government.

Further, NMFS interprets the MMPA to require the agency to maintain an inventory of these exported animals and their progeny.

We strongly object to all efforts by NMFS to apply the MMPA internationally, be it letters of "comity" or inventory requirements. These proposals not only raise very serious international relations issues, but they also **raise** serious questions about whether NMFS should be using its limited resources to transform itself into an international regulatory agency.

### **The Removal of Marine Mammals from the Wild**

Existing regulations, **finalized** in 1996 after the passage of the 1994 amendments to the MMPA, require a permit applicant to demonstrate that any **taking** "by itself or in combination with other activities, will not likely have a significant adverse impact on the species or stock ...." This is reasonable. However the Proposed Regulations significantly change this existing standard and create an impossible to meet burden. Unlike the existing regulations which require a showing

that the taking is not “likely” to have a significant adverse effect on the species, the Proposed Regulations require that the public display community prove a negative *i.e.*, that the taking “will not have” a significant adverse effect.

We strongly object to the establishment of standards that are impossible to meet. A public display facility could undertake extensive, expensive, and time-consuming research to gather and analyze population level information and to evaluate every other direct or indirect take or source of mortality yet never meet the agency’s threshold of proof. Even the Endangered Species Act does not have a take provision as stringent as that which NMFS is attempting to insert into the MMPA.

### **Transfer, Reporting and Other Requirements**

The 1994 Amendments provide that a person issued a permit to take or import marine mammals for public display shall have the right “without obtaining any additional permit or authorization” to sell, transport, transfer, etc. the marine mammal to persons who meet the MMPA requirements. The MMPA also provides that a person exercising these permit rights must notify the Secretary of Commerce no later than 15 days before any sale, transport, etc. However, the Proposed Regulations ignore the simple and direct process contained in the MMPA. In the Proposed Regulations, this simple 15-day notification has been transformed into the submission of three transport notifications for the same transaction and three Marine Mammal Data Sheet forms restating the information already in the inventory.

Moreover, the Proposed Regulations require that before a transport can occur, both the holder and the receiver must provide NMFS with a certification that the receiver meets the three requirements for holding a marine mammal. However, the Proposed Regulations make persons subject to civil or criminal penalties for submitting false information should NMFS judge that the receiving facility is not in full compliance with APHIS standards. It is not clear why an APHIS determination of compliance with APHIS requirements is not adequate and why the shipper and receiver must provide an independent certification, particularly when the MMPA says the transfer may occur without further permit or authorization.

We object strongly to the additional requirements NMFS is proposing for the transfer of marine mammals. The agency has taken the simple notification requirement provided for in the MMPA and converted it into a needlessly cumbersome process that could result in the criminal penalties.

### **Reporting of Stillbirths**

Congress intended that the marine mammal inventory be a record of marine mammals actually held at public display facilities. It is neither appropriate nor necessary that the Proposed Regulations require facilities to report stillbirths since such animals will not become part of the inventory of animals at public display facilities. The issue regarding stillbirths is with respect to genetics and public display facilities already report stillbirths to the persons who maintain these genetic records.

### **Conclusion**

The Alliance of Marine Mammal Parks and Aquariums will be submitting more detailed comments on these Proposed Regulations. We support the Alliance comments.

We hope these comments will be helpful in promulgating a rule that more closely reflects the 1994 amendments to the MMPA.

Sincerely

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